

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF COMMERCE

In the Matter of William Bernier, d/b/a  
Cedar Bridge Realty

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION**

The above-entitled matter came on for a hearing before Administrative Law Judge Kathleen D. Sheehy on June 17, 2005, at the Office of Administrative Hearings in Minneapolis, Minnesota. The OAH record closed at the conclusion of the hearing on that date.

Michael J. Tostengard, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Commerce (the Department).

Chad D. Lemmons, Esq., Kelly & Fawcett, P.A., 444 Cedar Street, Suite 2350, St. Paul, MN 55101, appeared for William Bernier (Respondent).

**NOTICE**

This Report is a recommendation, not a final decision. The Deputy Commissioner of Commerce will make the final decision after a review of the record. The Deputy Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Deputy Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Deputy Commissioner. Parties should contact Kevin M. Murphy, Deputy Commissioner, Minnesota Department of Commerce, 85 Seventh Place East, Suite 500, St. Paul, Minnesota 55101, telephone (651) 296-9411, to ascertain the procedure for filing exceptions or presenting argument to the Deputy Commissioner.

If the Deputy Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Deputy Commissioner, or upon the expiration of the deadline for doing so. The Deputy Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

## STATEMENT OF ISSUES

The issues presented in this case are whether the Department properly suspended the Respondent's real estate broker's license and whether the Department should take further disciplinary action because:

(1) the Respondent has demonstrated that he is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the Commissioner's authority, in violation of Minn. Stat. § 45.027, subd. 7(a)(4); and

(2) the Respondent violated Minn. Stat. §§ 82.35, subd. 1(a); 82.41, subd. 13(5); and 58.12, subd. 1(iv) & (v), in failing to disclose to the Commissioner his criminal convictions for aggravated assault and violation of a restraining order.<sup>[1]</sup>

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. The Respondent has been a licensed real estate agent since December 1996. He has had a real estate broker's license since August 2000. He has also been licensed as a mortgage broker since August 4, 2001.<sup>[2]</sup>

2. The Respondent specializes in selling foreclosed or vacant properties.<sup>[3]</sup> His work requires him to be in frequent contact with housing inspectors and other personnel in the St. Paul Office of Licensing, Inspections, and Environmental Protection (LIEP).<sup>[4]</sup>

3. In December 2003, the Respondent had a series of contacts with personnel in the St. Paul LIEP Office. In conversations on December 22 and 31, the Respondent made statements to different persons in the office to the effect that he would not be surprised if more housing inspectors do not end up like Don Junneman, a housing code inspector who was murdered in 1995 while on a building inspection. He also advised a LIEP employee to "tell your people to watch out because someone might kill one of them."<sup>[5]</sup> When interviewed by a police officer on January 2, 2004, the Respondent admitted making these statements, and he further stated that "sometime in the future someone is going to kill one of the inspectors. It won't be [me] because [I have] too much to lose."<sup>[6]</sup>

4. Based on these statements, the St. Paul LIEP Office sought and obtained a harassment restraining order in Ramsey County District Court on January 9, 2004. The order precludes the Respondent from contacting LIEP employees or from coming to the LIEP office, unless he has a scheduled appointment with Sgt. Ramstad, the criminal investigator assigned to LIEP. The order further provides the Respondent with the name of a specific contact person to schedule necessary inspections on his properties or to ask questions related to any outstanding orders.<sup>[7]</sup> The order is effective until January 9, 2006.<sup>[8]</sup>

5. On January 14, 2004, the Respondent contacted LIEP personnel in violation of the harassment restraining order. He was charged with a misdemeanor count of violating the restraining order, in violation of Minn. Stat. § 609.748. On June 30, 2004, the Respondent pleaded guilty to the charge, and on August 26, 2004 he was sentenced to probation for one year. One of the conditions of his probation was that he undergo a psychological evaluation.<sup>[9]</sup>

6. On November 5, 2004, the Respondent had an altercation with a former client at the former client's home. The Respondent's listing contract with the client had expired on October 31, 2004. A few days later, the client told Respondent in a telephone conversation that he should come to pick up his lock box and the "for sale" sign, because the client no longer wanted the Respondent to represent him. On November 5, 2004, the Respondent went to the property to get the lock box and sign. He entered the house and became engaged in a verbal argument with the former client, which progressed to a physical fight, during which the Respondent hit the former client repeatedly with the lock box, leaving visible injuries.<sup>[10]</sup>

7. In connection with this incident the Respondent was charged with fifth-degree assault, in violation of Minn. Stat. § 609.224, subd. 2. This charge is a gross misdemeanor.

8. On April 7, 2005, the Respondent was convicted of the gross misdemeanor charge and ordered to return for sentencing on May 23, 2005.<sup>[11]</sup>

9. On May 17, 2005, the Commissioner issued the Notice of and Order for Hearing, Order to Show Cause, Order for Summary Suspension, and Statement of Charges. The Notice was served on the Respondent by first-class mail on May 20, 2005. The hearing was held as scheduled on June 17, 2005.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 45.027, and 326.91.

2. The Notice and Order for Hearing issued by the Department was proper and the Department has fulfilled all relevant procedural requirements of law and rule.

3. If the commissioner believes discipline of a license is merited, the commissioner shall issue an order requiring a licensee to show cause why the license should not be revoked or suspended, or the licensee censured, or the application

denied. The commissioner may, by order, summarily suspend a license pending final determination of an order to show cause. If a license is suspended pending final determination of an order to show cause, a hearing on the merits must be held within 30 days of the issuance of the order of suspension.<sup>[12]</sup>

4. The Commissioner may deny, suspend, or revoke the authority or license of a person subject to the duties and responsibilities entrusted to the commissioner, or censure that person if the commissioner finds that the order is in the public interest and the person has engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the commissioner.<sup>[13]</sup>

5. The entry of the restraining order against the Respondent, the Respondent's violation of the restraining order, and the Respondent's gross misdemeanor conviction for aggravated assault of a client, collectively, are acts relating to the Respondent's real estate business that demonstrate the Respondent is unqualified to act as a real estate broker under the authority or license granted by the commissioner.

6. The commissioner may by order deny, suspend or revoke any license or may censure a licensee if the commissioner finds (1) that the order is in the public interest, and (2) that the applicant or licensee has filed an application for a license which is incomplete in any material respect or contains any statement which, in light of the circumstances under which it is made, is false or misleading with respect to any material fact.<sup>[14]</sup>

7. There is no evidence that the Respondent filed an application for a license that contains any incomplete statements or statements that are false or misleading. The Department has failed to prove the Respondent violated Minn. Stat. § 82.35, subd. 1(a).

8. Making a material misstatement in an application for a license or in any information furnished to the commissioner is a fraudulent, deceptive, or dishonest practice subjecting a real estate broker to discipline under Minn. Stat. § 82.40, subd. 1(b).<sup>[15]</sup>

9. There is no evidence that the Respondent made a material misstatement in an application for a license or in any information furnished to the commissioner. The Department has failed to prove that the Respondent violated Minn. Stat. § 82.41, subd. 13(a)(5).

10. The imposition of discipline and/or civil penalties against the Respondent is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the Commissioner of Commerce take disciplinary action against the Respondent.

Dated: July 13, 2005

s/Kathleen D. Sheehy

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KATHLEEN D. SHEEHY  
Administrative Law Judge

Reported: Tape recorded (one tape).

### **NOTICE**

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

### **MEMORANDUM**

The Department presented evidence that over the last year and one-half, the Respondent has acted in an increasingly aggressive manner in dealing with the frustrations inherent in the job of a real estate broker. The Department has established that the Respondent's threatening statements to LIEP personnel and recent use of physical aggression toward a client demonstrate that, at least at the present time, he is not qualified to act as a real estate broker.<sup>[16]</sup> The Respondent testified to a substantially different version of events than is contained in the police report concerning the November 5, 2004, assault charge; however, a district court judge has found the Respondent guilty of the charge beyond a reasonable doubt, and the Administrative Law Judge must accept that finding.

The Department alleged that the Respondent failed to disclose information relating to the restraining order and the two later criminal convictions, in violation of Minn. Stat. § 82.35, subd. 1(a), and 82.41, subd. 13(a)(5). The Administrative Law Judge has concluded the evidence does not substantiate these allegations, because the Department failed to offer any evidence of the Respondent's applications for the licenses held.

There was additional testimony at the hearing of other possible disclosure violations, including Minn. Stat. § 82.39, subd. 3, which requires licensed real estate brokers to notify the commissioner in writing of any final adverse decision or order of a court, whether or not the decision or order is appealed, regarding any proceeding in which the licensee was named as a defendant, and which alleged fraud,

misrepresentation, or the conversion of funds, if the final adverse decision relates to the allegations of fraud, misrepresentation, or the conversion of funds. The Department did not allege the Respondent violated Minn. Stat. § 82.39, subd. 3; even if the violation had been properly alleged, however, the evidence would be insufficient to conclude that the Respondent failed to disclose any proceeding alleging fraud, misrepresentation, or the conversion of funds. The facts underlying the harassment restraining order, the facts underlying the restraining order violation, and the facts underlying the gross misdemeanor assault conviction, while serious in and of themselves, do not constitute fraud, misrepresentation, or conversion of funds.

In addition, Minn. Stat. § 82.38, subd. 5, requires licensed real estate brokers to notify the commissioner in writing if the licensee is charged with, adjudged guilty or, or enters a plea of guilty or nolo contendere to a charge of any felony, or of any gross misdemeanor alleging fraud, misrepresentation, conversion of funds, or a similar violation of any real estate licensing law. Again, the Department did not allege the Respondent violated Minn. Stat. § 82.39, subd. 5; and even if it had, the record would not be adequate to substantiate that the Respondent failed to disclose any charge or conviction of any felony or any gross misdemeanor alleging fraud, misrepresentation, or conversion of funds.

Similarly, Minn. Stat. § 82.31, subd. 6, requires licensed real estate brokers to notify the commissioner in writing of changes of information contained in a license application on file with the commissioner. The Department offered no evidence concerning the Respondent's license application, and there would be no basis for concluding that the Respondent failed to notify the commissioner of changes of information contained in that application.

K.D.S.

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<sup>[1]</sup> The Notice of and Order for Hearing, Order to Show Cause, Order for Summary Suspension, and Statement of Charges contains additional counts (Counts III through VI), which counsel for the Department elected not to present evidence on during the hearing. The hearing addressed only Counts I and II.

<sup>[2]</sup> Testimony of William Bernier.

<sup>[3]</sup> *Id.*

<sup>[4]</sup> *Id.*

<sup>[5]</sup> Ex. 3, Affidavit and Petition for Harassment Restraining Order.

<sup>[6]</sup> *Id.*

<sup>[7]</sup> Ex. 3, Order Upon Petition for Harassment Restraining Order, January 9, 2004.

<sup>[8]</sup> The Respondent did not request a hearing to challenge the factual allegations made in the Petition or the scope of the restraining order.

<sup>[9]</sup> Ex. 2.

<sup>[10]</sup> Testimony of William Bernier; Ex. 1.

<sup>[11]</sup> Ex. 1. There is no information in the record as to the terms of the sentence imposed for this offense.

<sup>[12]</sup> Minn. Stat. § 45.027, subd. 7(b).

<sup>[13]</sup> Minn. Stat. § 45.027, subd. 7(a)(1) & (a)(4).

<sup>[14]</sup> Minn. Stat. § 82.35, subd. 1(a).

<sup>[15]</sup> Minn. Stat. § 82.41, subd. 13(a)(5).

<sup>[16]</sup> The Affidavit filed in support of the Petition for Harassment Restraining Order contains information indicating that the Respondent may be mentally ill.